Supreme Court, U.S.
FILED
AUG 10 1994
OFFICE OF THE CLERK

(3)

No. 94-68

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, ET AL.,
Petitioners,

v.

NARRAGANSETT INDIAN TRIBE, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF AMICUS CURIAE OF THE COMMONWEALTH OF MASSACHUSETTS AND THE STATES OF ALABAMA, ALASKA, ARIZONA, CALIFORNIA, CONNECTICUT, FLORIDA, MAINE, NEVADA AND SOUTH CAROLINA IN SUPPORT OF PETITIONERS

SCOTT HARSHBARGER
Attorney General
of Massachusetts

DOUGLAS H. WILKINS*
Assistant Attorney General
1 Ashburton Place, Room 2019
Boston, Massachusetts 02108
(617) 727-2200
**Counsel of Record*

(Additional Counsel on Inside Cover)

31 pp

JAMES H. EVANS
Attorney General
of Alabama

BRUCE M. BOTELHO
Attorney General
of Alaska

GRANT WOODS
Attorney General
of Arizona

DANIEL E. LUNGREN
Attorney General
of California

RICHARD BLUMENTHAL
Attorney General
of Connecticut

ROBERT A. BUTTERWORTH
Attorney General
of Florida

MICHAEL E. CARPENTER
Attorney General
of Maine

FRANKIE SUE DEL PAPA
Attorney General
of Nevada

T. TRAVIS MEDLOCK
Attorney General
of South Carolina

Questions Presented

1. Should the Indian Gaming Regulatory Act of 1988, 25 U.S.C. §§2710-2721 and 18 U.S.C. §§1166-1168 ("IGRA") be construed in harmony with the claims settlement acts approved by Congress?

2. Does the First Circuit's ruling that IGRA impliedly repeals portions of the Rhode Island Indian Claims Settlement Act ("RICSA") unnecessarily raise issues under the Fifth and Tenth Amendments to the United States Constitution, which could be avoided by a proper construction of the statutes in question?

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Statement of Interest of Amici Curiae

The *amici curiae* Commonwealth of Massachusetts and the States identified on the cover of this brief are sovereign States who have federally recognized Indian tribes within their borders. The *amici* have received requests from these tribes to negotiate regarding proposed gambling operations on tribal lands. They are deeply interested in this case, because the Court of Appeals' opinion jeopardizes statutory and constitutional rights of the States. Even more ominously, the Court of Appeals' ruling that IGRA impliedly repealed a material portion of a negotiated agreement between Rhode Island and the Narragansetts, enacted into federal law, calls into question whether States may ever rely upon their voluntary resolution of disputes with tribes, even after Congress ratifies their settlement agreement. If left undisturbed, the ruling below warns States that a carefully negotiated agreement with a tribe, approved by a federal statute, may be subject to unilateral repeal by implication by Congress at a later date, after the State has already given the bargained-for consideration to the tribe.

The issue extends well beyond Rhode Island and affects any State that has or may in the future wish to enter into federally approved compacts with tribes. Congress has already approved settlements between some of the *amici* and the tribes within their respective borders. For instance, in 1987, Congress approved the Massachusetts Indian Land Claims Settlement between the Commonwealth and the Wampanoag Tribal Council of Gay Head, Inc. 25 U.S.C. § 1771 *et seq.*, Pub. L. 100-95, 101 Stat. 704 (Aug. 18, 1987). The settlement, as

enacted by Congress, reserved the Commonwealth's jurisdiction to apply its law to tribal lands and members and denied the Tribe any such jurisdiction.[1] The Massachusetts settlement act expressly makes applicable to tribal land those "laws and regulations which prohibit or regulate the conduct of bingo or any other game of chance." 25 U.S.C. § 1771g.[2] Similarly,

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[1] The relevant statutes read:

> Except as otherwise expressly provided in this subchapter, or in the State Implementing Act, the settlement lands and any other land that may now or hereafter be owned by or held in trust for any Indian tribe or entity in the town of Gay Head, Massachusetts, *shall be subject to the civil and criminal laws*, ordinances and jurisdiction of the Commonwealth of Massachusetts and the town of Gay Head, Massachusetts (*including those laws and regulations which prohibit or regulate the conduct of bingo or any other game of chance*). 25 U.S.C. § 1771g (emphasis added).

> The Wampanoag Tribal Council of Gay Head, Inc., shall not have any jurisdiction over nontribal members and *shall not exercise any jurisdiction over any part of the settlement lands in contravention of* this subchapter, *the civil regulatory and criminal laws of the Commonwealth of Massachusetts*, the town of Gay Head, Massachusetts, and applicable Federal laws. 25 U.S.C. § 1771e(a) (emphasis added).

[2] While the arguments in this brief suffice to demonstrate that the Massachusetts settlement act is not impliedly repealed by

the Maine Indian Claims Settlement Act was enacted in 1980, governing the relations between Maine and the Passamaquoddy Tribe, the Penobscot Nation and the Houlton Band of Maliseet Indians. 25 U.S.C. §1721 *et seq.*, Pub. L. 96-420, §4, 94 Stat. 1787 (Oct. 10, 1980). With some non-applicable exceptions (generally relating to certain child welfare, land transfer, condemnation and taxation matters), the Act provides that tribes within Maine shall be subject to Maine's civil and criminal jurisdiction and laws.[3] The Maine settlement act also

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IGRA, the language of the Massachusetts Act provides additional grounds leading to that result. Not only does it expressly recognize the Commonwealth's regulatory power over "the conduct of bingo or any other game of chance," but as the First Circuit noted, 19 F.3d at 702, it also expressly limits tribal jurisdiction. 25 U.S.C. §§1771e(a), 1771g.

[3] The relevant statute provides that the Houlton Band of Maliseet Indians, among others, "shall be subject to the civil and criminal jurisdiction of the State, the laws of the State, and the civil and criminal jurisdiction of the courts of the State, to the same extent as any other person or land therein." 25 U.S.C. § 1725(a). With respect to the two other tribes recognized and involved in the settlement, the Act provides:

> The Passamaquoddy Tribe, the Penobscot Nation, and their members, and the land and natural resources owned by, or held in trust for the benefit of the tribe, nation, or their members, shall be subject to the jurisdiction of the State of Maine to the extent and in the manner provided in the Maine Implementing Act and that Act is hereby approved, ratified and confirmed.

25 U.S.C. § 1727(b)(1).

The Maine Implementing Act (30 M.R.S.A. §§ 6201 *et seq.*)

provides that "no law or regulation of the United States" shall affect Maine's civil, criminal or regulatory jurisdiction and that any future federal law that "would affect or preempt the application of the laws of the State of Maine" will not apply "unless such provision . . . is specifically made applicable within the State of Maine." 25 U.S.C. §§ 1725(h), 1735(b).[4]

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provides:

> Except as otherwise provided in this Act, all Indians, Indian nations, and tribes and bands of Indians in the State and any lands or other natural resources owned by them, held in trust for them by the United States or by any other person or entity shall be subject to the laws of the State and to the civil and criminal jurisdiction of the courts of the State to the same extent as any other person or lands or other natural resources therein.

30 M.R.S.A. § 6204. The Maine Implementing Act further provides that, with the exception of certain misdemeanors and juvenile crimes involving exclusively members of the Passamaquoddy Tribe or Penobscot Nation, "all laws of the State relating to criminal offenses and juvenile crimes shall apply within the Passamaquoddy and Penobscot Indian reservations and the State shall have exclusive jurisdiction over those offenses and crimes." 30 M.R.S.A. § 6209(1).

[4] While Maine agrees with the arguments in this brief, Maine further points out that the unique "specifically made applicable" language in the Maine settlement act (25 U.S.C. § 1735(b)) is another reason why a generic piece of legislation like IGRA, which does not mention Maine and has never otherwise been specifically made applicable within Maine, does not apply in Maine. Moreover, the Maine settlement act's "specifically made applicable" language demonstrates Congress' awareness in 1980

Like the Rhode Island settlement involved in this case, the Maine and Massachusetts settlements were negotiated and concluded between each State and tribe on a sovereign-to-sovereign basis.[5] The settlements resolved contested litigation and involved concessions by the States, in the form of consideration to the tribes. See, e.g. 1985 Mass. St. c. 277, § 3 (As part of the settlement, Massachusetts authorized its subdivision, the Town of Gay Head, to convey town lands to the Tribe.); *Penobscot Nation v. Stilphen*, 461 A.2d 478, 488 n.7 (Me.), app. dism., 464 U.S. 923 (1983)(acknowledgment by Tribe's counsel of the *quid pro quos* in the negotiation process). See also 25 U.S.C. § 1772(4)(consideration to be

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that there would be subsequent legislation affecting Indian tribes generally throughout the country (like IGRA) and that such legislation would not affect or preempt Maine law unless specifically made applicable in Maine. That is, Maine's "specifically made applicable" language is a deliberate bar to implied repeals of Maine's settlement act by future generic Congressional Indian legislation. Such repeals, to have effect, must be explicit. There is nothing in IGRA that explicitly repeals Maine's settlement act.

[5] Other settlement acts include the Seminole Indian Land Claims Settlement Act of 1987, 25 U.S.C. § 1772d(d)(1)(Florida laws concerning, among other things, gambling apply to settlement lands) and the Florida Indian Land Claims Settlement Act of 1982, 25 U.S.C. § 1747(b)(2)(A)(same as to settlement act lands of Miccosukee Tribe). See also Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993, 25 U.S.C. §§ 941*l*(a), 941m (post-IGRA settlement act providing that IGRA shall not apply to the tribe and that no future federal law will apply to the tribe unless the law is specifically made applicable within the State of South Carolina).

provided by Florida to the Seminole Tribe); 25 U.S.C. § 1743(same as to Miccosukee Tribe); 25 U.S.C. § 1771c(a)(1)(A); 25 U.S.C. § 941(a)(7)(benefits accruing to the Catawba Tribe and to South Carolina).

Read broadly, the decision of the Court of Appeals in this case is likely to engender litigation over States' authority to exercise jurisdiction over gambling activities that may have serious impacts upon the States' residents and environment. See also *Sycuan Band of Mission Indians v. Roache*, 788 F.Supp. 1498, 1503-04 (S.D. Cal. 1992)(holding that IGRA preempts 18 U.S.C. § 1162 (Pub. L. 280)). The *amici* States have outlawed or severely restricted casino gambling, because of the potential for commission or promotion of criminal activity. See, e.g., Mass. Gen. Laws, c. 271, §§ 1, *et seq.*; 17 M.R.S.A. § 332(3),(4); Cal. Pen. Code §§ 330, 330(a), 330.1. In addition, casinos in at least some of those States would likely have serious traffic and environmental effects, which would ordinarily be subject to state and local regulation. The *amici* submit this brief in support of the State of Rhode Island and Providence Plantations, because the Court of Appeals' rationale and holding are inconsistent with federal statutory and constitutional law.

Statement

The *amici* adopt Rhode Island's statement of the case.

Argument

The *amici* support the arguments made by Rhode Island in this case. This brief supplements Rhode Island's petition by concentrating on two aspects of this case that have great significance not only for existing settlement act States, but for any State that contemplates resolving matters of state and tribal jurisdiction voluntarily, with Congressional approval. First, while there is strong legislative history to support Rhode Island's position, the *amici*'s argument does not rise or fall upon legislative history, but follows entirely from the text and structure of IGRA and RICSA. Under the rules of statutory construction that must govern inter-sovereign agreements, the texts of IGRA and of state settlement acts like RICSA are consistent. Accordingly, IGRA did not implicitly repeal the confirmation of state jurisdiction in Indian settlement acts passed by Congress. Second, the Court of Appeals' opinion violates the general rule that statutes should be construed to avoid constitutional questions—in this case, questions arising under the Fifth and Tenth Amendments to the United States Constitution.

I. By Its Terms, IGRA Did Not Repeal Specific Settlement Agreements That Preserved State Jurisdiction.

The RICSA, like other tribal-state claims settlement acts, can be read consistently with IGRA. Under RICSA, the State of Rhode Island has bargained for and obtained tribal and federal statutory approval of state "civil regulatory jurisdiction, as well as civil adjudicatory jurisdiction . . ." over the lands in question. 19 F.3d at 696. By extending to laws that regulate

gambling, RICSA and other settlement acts expressly reject the frequently-made distinction in Indian gaming cases between regulatory laws and prohibitory laws. See, e.g., *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). Under RICSA, *both* types of state laws apply to gaming on Narragansett lands. Since the lands are expressly "subject to" this state jurisdiction (25 U.S.C. § 1708), the Tribe acknowledged and accepted its lack of jurisdiction, pursuant to RICSA, over activity that is unlawful under Rhode Island law. See also 25 U.S.C. § 1771e(a) (Massachusetts Claims Settlement Act excludes Wampanoag jurisdiction); 25 U.S.C. § 1725(b)(1),(f); 30 M.R.S.A. § 6204; *Penobscot Nation*, 461 A.2d at 478, 488 (Maine Claims Settlement Act excludes tribal jurisdiction).[6] The question is whether IGRA somehow created (or restored) tribal jurisdiction for the Narragansetts to engage in gambling on lands that are "subject to the civil and criminal laws and jurisdiction of the State of Rhode Island." 25 U.S.C. § 1708.

Contrary to the Court of Appeals' assumption, IGRA does not create any new tribal jurisdiction, but speaks only to the

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[6] While the First Circuit correctly noted that the Maine and Massachusetts settlement acts contain express "limits on Indian jurisdiction," 19 F.3d at 702, it failed to recognize that RICSA necessarily limited the Narragansetts' jurisdiction in the relevant sense under IGRA by making tribal land "subject to" Rhode Island law. In any event, even if RICSA contains fewer limits upon tribal jurisdiction than some other settlement acts, the more generally applicable and significant point remains that IGRA and RICSA can be reconciled without impliedly repealing Rhode Island's jurisdiction over gaming on Narragansett lands, as shown below.

rights of tribes that already have the requisite jurisdiction over tribal lands. In particular, IGRA does not contain any language expressly repealing prior, specific legislation allocating jurisdiction over tribal lands between States and tribes. Congress must have been aware of these pre-existing statutory limitations upon the jurisdiction of some tribes when it enacted IGRA.[7] See *Miles v. Apex Marine Corp*, 498 U.S. 19, 32 (1990). Not surprisingly, IGRA expressly recognizes such limitations:

> Class III gaming activities shall be lawful on Indian lands only if such activities are—
>
> (A) authorized by an ordinance or resolution that—
>
> (i) is adopted by the governing body of the Indian tribe *having jurisdiction over such lands*
>
> . . .

25 U.S.C. § 2710 (d)(1)(A)(emphasis added). Similarly, the ability to request negotiations over a tribal-state compact regarding class III gaming is limited to tribes "having jurisdiction:"

> Any Indian *tribe having jurisdiction over the Indian lands* upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into

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[7] Evidence of Congress' awareness, as well as its willingness to speak expressly to the issue of at least some prior statutes subjecting tribes to state jurisdiction, appears in the Indian Child Welfare Act of 1978. 25 U.S.C. § 1918(a).

> a Tribal-State compact governing the conduct of gaming activities.

25 U.S.C. § 2710(d)(3)(A)(emphasis added). Thus, not all tribes have authority under IGRA to request negotiations for a tribal-state gaming contract or to authorize class III gaming. Only those tribes "having jurisdiction over such lands" have that authority. By straightforward negative implication, the statute contemplates that some tribes will not have the requisite jurisdiction over tribal lands.[8] And, indeed, under RICSA, the Tribe within Rhode Island does not. By the express terms of IGRA, then, no class III gaming could be authorized by the tribe, since the Tribe lacks the requisite "jurisdiction over such lands." 25 U.S.C. § 2710(d)(1)(A).

Against this plain language in IGRA, the decision below works a distortion of the text, the prevailing rules of statutory contruction and federalism. The Court of Appeals' holding depends upon its conclusion "that the Settlement Act and the Gaming Act are partially but not wholly repugnant." 19 F.3d at 704. In the Court's view, Rhode Island's bargained-for sovereignty, making the settlement lands "subject to" its civil regulatory jurisdiction, was inconsistent with IGRA to the extent that the State claimed "jurisdiction touching on gaming." *Id.* But there is a way to read the text of both Acts that avoids all repugnancy. It is entirely consistent with IGRA to read RICSA as providing that the Naragansett Tribe is one of those

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[8] If necessary to avoid a statutory conflict, IGRA's reference to "jurisdiction" could and should be read to refer to jurisdiction only in the relevant sense, that is, civil regulatory jurisdiction over gambling. It is precisely that jurisdiction that RICSA places in the State.

tribes that lack the requisite jurisdiction that would trigger IGRA's mandatory negotiation provisions.

This construction avoids any need to resort to the disfavored repeal-by-implication doctrine and therefore must be adopted, under the fundamental principle that statutes should be read consistently with each other, if possible. See, e.g. *Randall v. Loftsgaarden*, 478 U.S. 647, 661 (1986); *United States v. Burns*, 725 F.Supp. 116 (N.D.N.Y. 1989), *aff'd sub nom. United States v. Cook*, 922 F.2d 1026 (2d Cir.), *cert. denied sub nom. Tarbell v. United States*, 500 U.S. 941 (1991)(IGRA does not implicitly repeal 18 U.S.C. § 1955, prohibiting operation of slot machines). Congressional approval of the Massachusetts settlement predated IGRA by only fourteen months, and Florida's Seminole settlement was less than a year old when IGRA passed. It would be highly unusual if statutes passed within barely a year of each other were so inconsistent that they cannot both stand. The reference to "jurisdiction" in IGRA thus must be interpreted in harmony with language of settlement acts. See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984); *Watt v. Alaska*, 451 U.S. 259, 266-67 (1981). To rule otherwise would violate the rule that effect must be given "to every clause and word of [the] statute" conferring jurisdiction on the States. See *Negonsott v. Samuels*, 113 S.Ct. 1119, 1123 (1993)(citation omitted).

The *amici*'s construction also obviates the need to conclude that Congress implicitly restricted state jurisdiction—an action that ordinarily would require a clear statement in the statute. This Court has recognized the need for a clear textual statement in federal legislation when Congress abrogates or diminishes traditional state authority in many contexts. See *Department*

of Revenue of Oregon v. *ACF Industries, Inc.*, 114 S.Ct. 843, 850 (1994)("Principles of federalism" require Congress to speak clearly if it intended to "set limits upon the taxation authority of state government, an authority [the Supreme Court has] recognized as central to state sovereignty."); *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991)(a clear statement is necessary before broad preemption of state law will be inferred under the Supremacy Clause)[9]; *Dellmuth v. Muth*, 491 U.S. 223, 230 (1989)(a "clear statement" to abrogate Eleventh Amendment immunity must appear in the language of the federal statute itself). It would violate these principles to conclude that Congress impliedly repealed state authority to regulate gambling under the settlement acts.

In this case, Congress first expressly preserved state jurisdiction in RICSA and then provided for IGRA negotiations only where tribes have jurisdiction. To read the statutes as the Court of Appeals did therefore creates a new and dangerous mechanism for the unintended—or at least unstated—restriction

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[9] While clear statement principles governing preemption of state law may not generally "apply to federal enactments regulating Indian tribes," *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-44 (1980), the present situation is not the ordinary one. Where a state settlement act confirms state regulatory authority over tribal lands and members, the question is not one of the "unique historical origins of tribal sovereignty," *id.*, because the settlement acts extinguish the aboriginal rights and similar claims of the tribes and their members. See e.g. 25 U.S.C. § 1705(a)(2),(3); 25 U.S.C. § 1723(3)(b),(c); 25 U.S.C. § 1744(b); 25 U.S.C. § 1772c(b); 25 U.S.C. § 1771b(b),(c). Rather, the question is one of abrogation of settled state authority in the absence of historical claims. In such situations, clear statement analysis and rationales apply with full force.

of state jurisdiction through the federal legislative process. Such a rule could adversely affect virtually every State in the Union and therefore should be the subject of review by this Court.

II. IN ORDER TO AVOID SERIOUS CONSTITUTIONAL QUESTIONS, IGRA MUST BE READ TO EXEMPT RHODE ISLAND AND OTHER SETTLEMENT ACT STATES FROM MANDATORY GOOD FAITH NEGOTIATIONS OVER INDIAN GAMING.

The Court of Appeals' construction of RICSA and IGRA led it to the erroneous conclusions that the two statutes are "partially . . . repugnant" and that Rhode Island's bargained-for regulatory jurisdiction over gaming must be abrogated. Even if such an approach were consistent with usual rules of statutory construction, it would violate the principle that statutes must be construed to avoid constitutional questions. See, e.g., *New York v. United States*, 112 S.Ct. 2408, 2425 (1992). Only a holding that Rhode Island is under no statutory obligation to negotiate would avoid the necessity for a decision—in this case or subsequent cases[10]—whether IGRA is constitutionally infirm under the Fifth and Tenth Amendments

As construed by the Court of Appeals, IGRA has divested

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[10] While Rhode Island did not raise the 5th and 10th Amendment issues below, the statutory construction question involved here cannot be decided without considering the constitutional provisions protecting the States from certain federal legislation. Moreover, the constitutional questions are likely to arise in subsequent cases, possibly involving the *amici*.

the State of jurisdiction that was negotiated, agreed to and confirmed as a means of resolving litigation in an agreement between Rhode Island and the Narragansetts on a sovereign-to-sovereign basis. If IGRA truly overrides state jurisdiction, then Congress has asserted a power to prejudice the rights of the States retroactively by altering unilaterally the terms of a settlement agreement despite previous Congressional approval of the agreement, and despite the careful negotiations between the sovereign States and the sovereign tribes. It has asserted this power notwithstanding the provision of consideration for the agreement by the States (see above, pp. 5-6). Any suggestion that Congress may do so must take account not only of the States' sovereignty, embodied in the constitutional scheme, but also of the general constitutional principles limiting the federal government's ability to impair agreements.

For instance, Congress may not repudiate agreements that it makes with private parties. See *Lynch v. United States*, 292 U.S. 571 (1934)(invalidating congressional attempt to cancel government war risk life insurance). Tribe, *American Constitutional Law*, (2d ed. 1988), p. 613, n.1. But see *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 733 (1984)(stating that the "standards imposed on economic legislation by the Due Process Clauses" are "less searching than those imposed on States by the contract clause"). Similarly, Congress may not unilaterally abrogate a treaty with an Indian tribe, or amend "or repeal a statute guaranteeing rights to a tribe or tribal members" unless it provides compensation under the Fifth Amendment takings clause. Tribe, *supra*, at 1474, n.42, citing *Hodel v. Irving*, 481 U.S. 704 (1987); *United States v. Sioux Nation of Indians*,

448 U.S. 371 (1980); See *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 277-78 & n.9 (1955). Where a treaty between the United States and a tribe sets lands apart for the undisturbed use of a tribe,

> [federal] power does not extend so far as to enable the Government "to give the tribal lands to others or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation . . .; for that 'would not be an exercise of guardianship, but an act of confiscation'" [citations omitted].

Shoshone Tribe v. United States, 299 U.S. 476, 497 (1937).

Ordinarily, "the same principles of just compensation presumptively apply to both private and public condemnees." *United States v. 50 Acres of Land*, 469 U.S. 24, 31 (1984). See *United States v. Carmack*, 329 U.S. 230, 242 (1946). Whether the rules governing compensation under the Fifth Amendment, or different rules grounded in the Tenth Amendment and the Constitutional scheme, apply to a Congressionally approved compact between sovereign States and tribes appears to be unsettled. At any rate, it is highly unlikely that the Fifth Amendment tolerates unilateral federal abrogation of contracts between sovereign States and sovereign tribes. See *Block v. North Dakota*, 461 U.S. 273, 291 (1983)("The State probably is correct in stating that Congress could not, without making provision for payment of compensation, pass a law depriving a State of land vested in it by the Constitution."). The Court of Appeals' ruling thus raises a serious constitutional issue whether, without providing compensation, Congress may approve implementation of a

settlement agreement between two sovereigns, only to change the terms materially by depriving the states of their bargained-for authority as few as 14 months after approval. Such a ruling should not stand unreviewed by this Court where, as here, there is an alternative statutory construction available. The Court of Appeals' ruling to the contrary calls for review by this Court in order to preserve the statutory and constitutional balance between the States, Indian tribes and Congress.

The Court of Appeals' decision raises a potentially more insuperable problem, as well. Even if IGRA provided compensation to the States, the construction given to IGRA by the Court of Appeals raises serious Tenth Amendment questions regarding Congress' alleged power to abrogate a sovereign-to-sovereign agreement unilaterally. Congress' power to curtail state authority has constitutional limits, rooted in the constitutionally recognized sovereignty of the States.[11] Under IGRA, as construed by the Court of Appeals, Congress

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[11] See *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71 (1869)(state taxing power); *Coyle v. Smith*, 221 U.S. 559, 565 (1911)(Congress may not prescribe location of a state's capital); *Hopkins Federal Savings & Loan Association v. Cleary*, 296 U.S. 315 (1935)(conversion of quasi-public state savings and loan associations into federal associations contravenes the reserved powers of the states). See also *Fry v. United States*, 421 U.S. 542, 547, n.7 (1975)(the various provisions of the Constitution are to be construed harmoniously with the States' reserved powers); *Carmack*, 329 U.S. at 241, n.10 ("If the Federal Government desires exclusive legislative jurisdiction over land acquired by it, the Constitution indicates that the consent of the state in which the land is located is necessary," citing U.S. Const. Art. I, § 8, Cl.17).

has not simply enacted federal law, but has apparently required the States to negotiate away the very sovereignty for which they gave consideration to the tribes.

The leading, recent Tenth Amendment case is *New York v. United States*, 112 S.Ct 2408 (1992). There, the Supreme Court struck down the so-called "take title" provision of the Low Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. § 2021e(d)(2)(C). The take-title provision required that, if a State failed to have a disposal site constructed by the statutory deadline, then the State would take title to all low level radioactive waste generated within its boundaries. The Court held that the Constitution protects the States against "federal action [that] would 'commandeer' state governments into the service of federal regulatory purposes, and would for this reason be inconsistent with the Constitution's division of authority between federal and state governments." *Id.*, 112 S.Ct at 2428.

The defect in the Radioactive Waste statute was in the means chosen—commandeering of the state governmental process—rather than in the goal of the legislation; the Court readily acknowledged that Congress has authority to regulate disposal of hazardous waste:

> [W]hether or not a particularly strong federal interest enables Congress to bring state governments within the orbit of generally applicable federal regulation, no Member of the Court has ever suggested that such a federal interest would enable Congress to command a state government to enact state regulation. No matter how powerful the federal interest involved, the Constitution simply does not give

> Congress the authority to require the States to regulate. The Constitution instead gives Congress the authority to regulate matters directly and to pre-empt contrary state regulation. Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents.

Id., 112 S.Ct. at 2429.

IGRA's compulsory negotiation provisions violate these principles. The fact that Rhode Island and other States had undisputable—and Congressionally ratified—regulatory authority over the lands in question prior to IGRA compounds the Tenth Amendment violation in this case. IGRA coerces the States to become involved involuntarily in administering a federal program either through compliance with the mandate of "good faith negotiations" or through Court orders, mandated negotiation and mediation. See 25 U.S.C. § 2710(d). The federal court in an IGRA case examines the good faith of high state officials performing discretionary functions relating to permitting gambling activities within the state's borders. 25 U.S.C. § 2710(d)(7). If the Court finds bad faith, it is to issue orders requiring the States to make good faith offers—which may be accepted and create binding obligations—even if the responsible State officials believe that no offer to approve class III gaming should be made, pursuant to general state policy against particular types of gambling. See 25 U.S.C. § 2510(d)(7)(B). This scheme commandeers the machinery of state government for federal purposes. In the case of settlement act States, the scheme compels the States to negotiate away their bargained-for rights under the federal

legislation approving their settlements.

It has been argued that IGRA presents no Tenth Amendment problem because a State may simply decline to negotiate and allow the matter to be decided by a mediator or the Secretary of Interior. *Cheyenne River Sioux v. South Dakota*, 3 F.3d 273, 281 (8th Cir. 1993).[12] If compliance with IGRA's good faith negotiation provisions is truly voluntary, then there is no Article III "case or controversy" in IGRA cases. Article III does not place the courts in the position of mediating voluntary decisions of state governments. Cf. *Gilligan v. Morgan*, 413 U.S. 1 (1973)(complaint by students against Governor regarding deployment of the National Guard was not justiciable). The decision of the States and their Governors not to negotiate, if truly voluntary, would be the end of the matter. There would be no controversy for the court to adjudicate, no need for orders to negotiate and to mediate, and no reason for Article III courts to declare the rights of the Tribe to negotiate with an unwilling partner. The entire basis of the court's jurisdiction in the first place is the existence of a case or controversy over a legal *duty* purportedly established by IGRA: whether, in Senior District Judge

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[12] This argument was rejected by one court on the ground that IGRA is obviously not voluntary. See *Confederated Tribes of the Colville Reservation v. State of Washington*, No. CS-92-0426-WFN (E.D. Wash. June 4, 1993), slip op. at 3-4 (the Court "cannot simply choose to ignore the mandatory language which forces the State to take part in this regulatory scheme"), citing *Board of Natural Resources v. Brown*, 992 F.2d 937 (9th Cir. 1993) (Tenth Amendment invalidates provisions of the Forest Resources Conservation and Shortage Relief Act that mandate action by the States and are not mere "precatory admonitions").

Pettine's words, "the State is obligated to enter into good faith negotiations with the Tribe after receiving [the Tribe's] request." 816 F. Supp. at 800. If a legal obligation to negotiate in good faith exists, then the Tribe can hardly make the contradictory claim that negotiations are voluntary. Such a claim would render federal judicial judgments ordering negotiations advisory and therefore cannot be correct.

In short, the Court of Appeals' opinion raises serious Fifth and Tenth Amendment questions. All aspects of the Fifth and Tenth Amendment issues weigh in favor of Rhode Island's construction of the applicable statutes—a construction that avoids constitutional problems. The state interests protected by the Fifth and Tenth Amendments weigh heavily in favor of review by this Court.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted.

SCOTT HARSHBARGER
Attorney General
of Massachusetts

DOUGLAS H. WILKINS*
Assistant Attorney General
1 Ashburton Place, Room 2019
Boston, Massachusetts 02108
(617) 727-2200
**Counsel of Record*

Date: August 10, 1994